STATE OF MICHIGAN

COURT OF APPEALS

JOHN L. MOORER,

Plaintiff-Appellant,

V

W. FREDERICK MOORE,

Defendant-Appellee.

UNPUBLISHED
August 21, 2001

No. 222806
Wayne Circuit Court
LC No. 98-823967-NM

Before: K.F. Kelly, P.J., and White and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition to defendant regarding plaintiff's claim of legal malpractice for defendant's representation of plaintiff in a criminal trial. We affirm.

Plaintiff argues that the trial court erred in granting summary disposition on the ground that plaintiff failed to enlist an expert witness to testify regarding the standard of care. Specifically, plaintiff contends that the facts in the underlying malpractice action are such that an average lay person could recognize that a breach of the standard of care occurred, and therefore no expert witness is required. For the same reasons, plaintiff contends that the court's decision to deny his motion for reconsideration was an abuse of discretion. We disagree.

We review a motion for summary disposition de novo. *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 202; 544 NW2d 727 (1996). Additionally, this Court reviews a trial court's decision to deny a motion for reconsideration for an abuse of discretion. *In re Beglinger Trust*, 221 Mich App 273, 279; 561 NW2d 130 (1997).[1]

In *Stockler v Rose*, 174 Mich App 14, 48; 436 NW2d 70 (1989), this Court explained:

[1] Plaintiff has failed to provide this Court with the necessary transcript of the hearing on defendant's motion for summary disposition. Generally, an appellant is required to provide this Court with the lower court record by filing all transcripts in the lower court file. MCR 7.210(B)(1)(a); *Nye v Gable, Nelson & Murphy*, 169 Mich App 411, 414; 425 NW2d 797 (1988). Accordingly, we note that we are not obligated to review plaintiff's claims on appeal. See *People v Coons*, 158 Mich App 735, 740; 405 NW2d 153 (1987).

> In a malpractice action, expert testimony is usually required to establish a standard of conduct, breach of that standard of conduct, and causation. *Thomas v McPherson Community Health Center,* 155 Mich App 700, 705; 400 NW2d 629 (1986). Where the absence of professional care is so manifest that within the common knowledge and experience of an ordinary layman it can be said that the defendant was careless, a plaintiff can maintain a malpractice action without offering expert testimony. *Joos v Auto-Owners Ins Co,* 94 Mich App 419, 422-424; 288 NW2d 443 (1979).

We find that expert testimony was required in this case because plaintiff's various allegations of negligence do not involve an "absence of professional care . . . so manifest that it can be said that the defendant was careless," nor do plaintiff's allegations involve any "obviously apparent" actions or omissions by defendant. Instead, plaintiff's assertions involve questions of trial strategy and professional judgment which would be beyond the province of a lay person jury and thus the general rule that an expert witness is required applies.

For the same reasons, plaintiff's motion for reconsideration (which plaintiff refers to as a motion for new trial) was property denied. MCR 2.119(F)(3).

Next, plaintiff argues that the court erred by failing to articulate findings of fact and conclusions of law on the record. We disagree.

First, we note that the court did articulate its legal reasoning in both its order granting summary disposition and its order denying plaintiff's motion for reconsideration. Second, MCR 2.517(A)(4) provides:

> Findings of fact and conclusions of law are unnecessary in decisions on motions unless findings are required by a particular rule. See, e.g., MCR 2.504(B).

In resolving a motion for summary disposition, a court may not make factual findings. *Nesbitt v American Community Mutual Ins Co,* 236 Mich App 215, 225; 600 NW2d 427 (1999). Therefore, the court's explanation that the motion for summary disposition was granted based on plaintiff's failure to supply an expert witness affidavit regarding the standard of care was not lacking.

Next, plaintiff argues that the court erred by prematurely granting summary disposition before discovery was complete. We disagree.

Summary disposition is premature if granted before discovery on a disputed issue is complete. *State Treasurer v Sheko,* 218 Mich App 185, 190; 553 NW2d 654 (1996). However, summary disposition may nevertheless be appropriate if further discovery does not stand a reasonable chance of uncovering factual support for the opposing party's position. *Village of Dimondale v Grable,* 240 Mich App 553, 566; 618 NW2d 23 (2000).

In this case, further discovery did not stand a chance of uncovering factual support for plaintiff's position. The "interrogatory discovery questions" that plaintiff served defendant were not aimed at uncovering factual support for plaintiff's claim because they were either irrelevant

to the issue of whether defendant negligently represented plaintiff in the underlying case, or were geared toward criticizing defendant's chosen trial strategy. These questions sought to discover information which was either irrelevant or dealt with matters of trial strategy for which an expert witness affidavit was required. No possible factual development could have resulted from plaintiff's questions which would have created a genuine issue of material fact. Therefore, summary disposition was appropriate.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Helene N. White
/s/ Michael J. Talbot